

# 2019 OFCCP Developments

What Federal Contractors Need to Know  
for 2020



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# Today's Agenda

- Recently issued notices and updates
- Review of 2019 OFCCP Directives
- OFCCP activity in 2019
- Compensation (including EEO-1)
- Upcoming Developments
- Reminders for contractors



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# Recently Issued Notices and Reminders on Older Regulations

EO No.	Title	Effective Date	Comments
13897	<b>Improving Federal Contractor Operations by Revoking Executive Order 13495</b> <ul style="list-style-type: none"> <li><i>Revokes obligation of successor federal contractors to “offer a right of first refusal of employment to employees employed under the predecessor contract”</i></li> </ul>	10/31/2019	<i>Applies only to certain types of federal government contracts</i>
13658	<b>Establishing a Minimum Wage for Contractors</b> <ul style="list-style-type: none"> <li><i>Min. wage increases to \$10.80 and tipped employees min. cash wage of \$7.55, eff. 1/1/2020</i></li> </ul>	Contracts entered into/modified on or after 1/1/2015	<i>Applies only to certain types of federal government contracts</i>
13706	<b>Establishing Paid Sick Leave for Federal Contractors</b> <ul style="list-style-type: none"> <li><i>Accrual of up to 56 hours of paid sick leave per year</i></li> </ul>	Solicitations on or after 1/1/2017	<i>Applies only to certain types of federal government contracts</i>

# 2019 OFCCP Directives

- 2019-01 - Compliance Review Procedures (rescinds DIR 2011-01)
- 2019-02 - Early Resolution Procedures
- 2019-03 - Opinion Letters and Help Desk
- 2019-04 - Voluntary Enterprise-wide Review Program
- 2019-05 - Contractors' Obligations Regarding Students in Working Relationships with Educational Institutions
- 2020-01 - Spouses of Protected Veterans



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# 2019 OFCCP Directives

## 2019-01 - Compliance Review Procedures

- Rescinds earlier Active Case Enforcement review process (**DIR 2011-01**) which required full blown compliance reviews each selected contractor site
- Allows OFCCP flexibility to use a variety of compliance review options, including less resource intensive compliance checks and focused reviews
- Should result in OFCCP completing more compliance reviews by using different types of reviews



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# 2019 OFCCP Directives

## 2019-02 - Early Resolution Procedures

- Allows resolution of compliance evaluation without issuance of Notice of Violation (NOV) or Pre-Determination Notice (PDN) thereby avoiding the normal negotiation process
- Intended to address multi-establishment contractors where violations detected at one establishment may exist at other establishments. Allows OFCCP to leverage the results of one compliance review to cover the contractor's other establishments not under review.
- Depending on the type of violation, there are different processes (Non-Material Violations, Material Violations: Non-Discrimination (recordkeeping, applicant tracking, no audit/reporting system, no self-analysis), Material Violations: Discrimination)
- Will require contractor to review all, or a negotiated subset, of its other establishments for the identified violations and report findings to OFCCP and take corrective action. Establishments covered by ERP resolution will be subject to 5 year monitoring period but no scheduled compliance evaluations.



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# 2019 OFCCP Directives

## 2019-03 - Opinion Letters and Help Desk

### Help Desk

- Allows contractors to ask questions by phone (1-800-397-6251) or online portal (<https://ofccpcontractor.dol.gov/s/>)
- Self-service portal allows contractors to search inquiries made over time

### Opinion Letters

- OFCCP may issue Opinion Letters “fact-specific guidance” in response to specific inquiries sent to the OFCCP.
  - OFCCP will not issue them to contractor while compliance evaluation is pending.
  - Letters are available publicly with identifying information redacted.
- To date, four Opinion Letters have been published. Available at <https://www.dol.gov/ofccp/regs/compliance/opinionletters/index.htm>
  - One dealt with Pay Groupings for compensation. Others related to DoD Skillbridge Program, FCC Universal Service Fund and jurisdiction related to Pell Grants



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# 2019 OFCCP Directives

## 2019-04 - Voluntary Enterprise-wide Review Program (VERP)

- OFCCP trying to expand coverage of contractors more efficiently and to supplement its regular compliance review process.
- There are two tiers of contractors in this program
  - Top tier: “Top performing” contractors with corporate-wide model diversity and inclusion programs
  - Second tier: “Compliant” contractors not yet at the “top performing” level but with OFCCP compliance assistance they can reach top tier
- Contractor must apply for VERP and OFCCP must conduct compliance review of headquarters and sample/subset of establishments
  - Contractors will be evaluated for regulatory compliance as well as undisclosed “established” criteria
  - Approved contractors will be removed from compliance evaluation schedule universe for duration of the agreement, but periodic compliance reports will be required
  - Initial agreement period for Top Tier is 5 years with reviewed at end for extension (Second Tier is 3 years)



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# 2019 OFCCP Directives

## 2019-05 - Contractors' Obligations Regarding Students in Working Relationships with Educational Institutions

- Applies to educational institutions primarily colleges and universities
- Provides notice that OFCCP will exercise its enforcement discretion to not require contractors to include student workers in AAP reports or analyses of personnel activity
- However, OFCCP will continue to take and investigate complaints from all employees including student workers
- OFCCP notes that, aside from the issue of including student workers in AAP analyses, it generally follows the common law test for determining whether a worker is an employee for the purposes of OFCCP compliance



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# 2019 OFCCP Directives

## 2020-01 - Spouses of Protected Veterans

- OFCCP is doubling down on regulatory prohibition against discrimination against spouses of protected veterans:
  - (e) Relationship or association with a protected veteran. It is unlawful for the contractor to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known protected veteran or pre-JVA veteran status of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association. 41 CFR 300.21(e)
- During compliance reviews, OFCCP will ask certain questions of HR staff and Managers, and of employees to identify spouses of protected employees and determine how they are being treated
- Contractors selected for compliance evaluations, especially VEVRAA Focused Reviews must be prepared to demonstrate understanding and compliance with this spouse/associate obligation



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# 2019 OFCCP Directives

## 2020-01 - Spouses of Protected Veterans (con't)

OFCCP also offers a sample policy statement:

*It is [Federal Contractor, Inc.'s] policy not to discriminate because of a person's relationship or association with a protected veteran. This includes spouses and other family members. Also, [Federal Contractor, Inc.] will safeguard the fair and equitable treatment of protected veteran spouses and family members with regard to all employment actions and prohibit harassment of applicants and employees because of their relationship or association with a protected veteran.*



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# OFCCP Activity

- **Past review activity still down**
  - 1,019 compliance reviews (audit) reported closed for the past Fiscal Year 2019 (10/1/2018 to 9/30/2019). **This is still on the lower range in many years.**
  - 812 compliance reviews reported in prior Fiscal Year 2018 (10/1/2017 to 9/30/2018)
  - In the past, OFCCP conducted up to 4,000 to 5,000 reviews annually
  - OFCCP still needs to increase this activity level to possibly over 3,000 reviews



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# OFCCP Activity

- **Future Audit Activity Expected to Increase**
  - In March 2019, OFCCP published list of 3,500 contractor establishments scheduled to be reviewed
    - 2,345 establishment reviews AAPs for EO 11246 (Minorities, Women), Section 503 (IWD) and VEVRAA (Veterans)
    - 500 Focused reviews for Section 503 AAPs (IWD)
    - 500 Compliance check reviews
    - 83 Corporate Management and 72 Functional reviews
  - In November 2020, OFCCP published a list of additional contractor establishments to be reviewed
    - 500 Focused reviews for VEVRAA AAPs (Protected Veterans)



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# OFCCP Activity

- **Some recent observations on compliance review activity:**
  - Still working through March 2019 list of reviews
  - Definitely pushing to speed up reviews (complete desk audit in 45 days!)
  - Still likely to have non-local offices involved in initial phase
  - Phone interviews prior to onsite (if necessary) especially about compensation
  - Fewer data requests
  - November 2019 list for Protected Veterans Focused Reviews: Scheduling letter to send selected contractors not yet available
- **Much of focus appears to be making better use of OFCCP resources to increase number of contractors coming under review**



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# OFCCP Activity

Financial settlements in FY 2019 are \$40.6 million compared to \$16 million+ in FY 2018. Some significant settlements:

- Goldman Sachs \$9.9 million- compensation
- Dell \$7 million - compensation
- Intel \$5 million - compensation
- Bank of America \$4.2 million - hiring
- Wells Fargo \$600k - hiring
- Penske Logistics \$350k - hiring
- Cintas \$424k - hiring and compensation
- Pacific Engineers and Architects \$21k - hiring related to disabled employee start date

Large Administrative Law Judge (ALJ) decision:

- Enterprise Rent a Car Baltimore \$6.6 million - hiring



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# OFCCP Activity

- Released Federal Contractor Compliance Manual (FCCM) on December 30, 2019
  - Updates the FCCM (last updated 2014)
  - Provides guidance to contractors on what and how OFCCP conducts compliance evaluations and provides detailed guidance on what will and will not be found to be compliant on each of the regulatory requirements
  - Provides guidance to OFCCP compliance officers in conducting compliance evaluations
  - Available online with annotated list of updates and table of contents with links to each chapter, section, directive and document
    - <https://www.dol.gov/agencies/ofccp/manual/fccm>



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# OFCCP Activity

- **Resources to assist contractors:**
  - Updating and adding to FAQs
    - For example, resource section for Disabled Focused Reviews including FAQs, publication of scheduling letter, Onsite guide, Standard Compliance Evaluation Report (SCER), etc.
  - Technical Assistance Guides for Educational, Construction and Service and Supply contractors
  - Opinion letters on contractor raised issues
- **OFCCP using the carrot**
  - Various recognition programs for disability inclusion, Functional AAPs, etc.
  - Cooperating with contractors such as Voluntary Enterprise-wide Reviews
- **OFCCP FY 2020 budget is up 2% (just finalized in December)**
  - Allows maintenance of current workforce (approx. 500)
  - Provides funds to upgrade internal case management systems



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# Compensation

- OFCCP still focusing on compensation during reviews
- Several large financial settlements in FY 2019 but still relatively few compensation cases
- Ongoing Google review and Oracle litigation
- OFCCP lost the Analogic case—a significant loss
  - Take-aways:
    - A regression analysis appropriate for the contractor's practices matters
    - Use the regression analysis results to inform how the compensation practices will be described and the data/factors that will be provided to OFCCP
    - Don't freak if the SD is > 2 SD; just dig deep for anecdotal evidence that shows no discrimination on cohort comparison
    - What gets cited and how worded in SCN and NOV is very important to what will get litigated later on
    - Disparate impact claims must identify the specific practice causing the disparity



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# Compensation

- **Use of EEO-1 2018/2017 Component 2**
  - OFCCP not planning to request from EEOC or make use of compensation Component 2 data submitted
  - EEOC does not appear to be very enthusiastic about the compensation data since it has been forced to collect this after suspending it earlier



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# Upcoming Developments

- **EEO-1 2017/2018 Component 2 Deadline**
  - Reporting portal still open until further notice (maybe January 31, 2020)
- **2019 EEO-1 report**
  - Component 2 not in EEOC's routine request for approval of EEO-1 report form submitted earlier to OMB
  - 2019 Report due March 31, 2020
    - Employee data for any pay period in the 4<sup>th</sup> Quarter 2019
      - NOTE: If use 12/31/2019 snapshot for EEO-1 reporting, also can use same for the VETS-4212 to be filed in the fall of 2020.
      - Calendar AAP (1/1/2020 anniversary date) year contractors can also use this for their AAP.



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# Upcoming Developments (cont.)

- **AAP Verification Program**
  - Provided for in earlier Directive
  - Possible certification or other action by contractor representing basic AAP compliance to OFCCP
  - Annual
- **Revised disability survey form**
  - Current form expires 1/31/2020
  - Expect new form to be released in early 2020
  - Slightly more streamlined based on initial draft released
- **Notice of Proposed Rulemaking-Procedures to Resolve Potential Employment Discrimination**
  - Adding practical significance of statistical evidence to PDN consideration
  - Addressing when non-statistical support is required for PDN
  - Comment deadline 1/29/2020



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# Upcoming Developments (cont.)

- **Fair Chance Act - “Ban the box”**
  - Prohibits federal contractors from inquiring about job applicant’s criminal background in hiring process until after conditional job offer made
  - Adds to other state and local regulations that contractor may have to comply with
  - For job openings related to federal contract work (similar to applicability of minimum wage and pay leave?)
  - Certain exceptions specified plus others to be added during regulation writing
  - Regulations to be issued by April 2021 and effective December 20, 2021 (almost two years in future)
  - Act as a result of the National Defense Authorization Act on December 20, 2019



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# Issues to Consider

- More emphasis on compliance efforts for Protected Veterans and Individuals with Disabilities



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## Issues to Consider (cont.)

- **Protected Veterans and Individuals with Disabilities**
  - Review outreach efforts
  - Complete assessment of outreach efforts annually
  - Consequences of failing to meet:
    - Hiring goal for Protected Veterans of 5.9% (3/31/2019)
    - Utilization goal for Individuals with Disabilities of 7%
  - Disability status survey of employees
    - Most need to conduct interim notification to revise status
    - In 2019/2020, depending on when all employees last surveyed, need to resurvey all employees for disability status
  - Reminder of ongoing focused reviews by OFCCP



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## PRESENTATION AVAILABLE FOR VIEWING

### Don't forget...

- Today's PowerPoint presentation and recording will be available by Friday on [www.SmithLaw.com/Webinar](http://www.SmithLaw.com/Webinar) and all past recorded webinars are available to view and download too.

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# *Thank you for attending today's webinar!*

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